

Fordham International Law Journal

Volume 28, Issue 2

2004

Article 8

Universal Jurisdiction In Abstentia

Ryan Rabinovitch*

*

Copyright ©2004 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Universal Jurisdiction In Absentia

Ryan Rabinovitch

Abstract

The purpose of this Article is to provide some clarification of universal jurisdiction in absentia. It begins with a brief overview of the state of international law on the issue, centering on the decision of the minority judges who treated it in the Arrest Warrant decision, and discuss the applicable principles of international law, international treaties, and custom. It then briefly examines whether allowing States to exercise universal jurisdiction in absentia is consistent with the historical and philosophical justifications for the existence of universal jurisdiction generally. The final section of the Article discusses the policy implications of such an exercise.

UNIVERSAL JURISDICTION *IN ABSENTIA*

Ryan Rabinovitch*

INTRODUCTION

In recent years, international jurists have given the issue of universal jurisdiction a great deal of attention. While some form of universal jurisdiction exists for war crimes, genocide, and crimes against humanity, the exact parameters of the doctrine are ill-defined. This Article addresses the question of whether international law requires, or should require, the presence of the offender in a forum State for universal jurisdiction to be exercised.

Recently, three notable situations have given rise to a discussion of universal jurisdiction *in absentia*: the International Court of Justice's ("ICJ") decision in *Case Concerning the Arrest Warrant of 11 April 2000* which discusses Belgium's arrest warrant for Congolese Foreign Minister Abdulaye Yerodia Ndombasi;¹ the Belgian Court of Appeals and Supreme Court cases regarding criminal proceedings private individuals brought against Israeli Prime Minister Ariel Sharon;² and, finally, the recently promulgated *Princeton Principles on Universal Jurisdiction*.³ Unfortunately, none of these instances shed much light upon the issue of

* Associate-in-Law, Columbia Law School, B.C.L. (McGill), LL.B. (McGill), B.C.L. (Oxon.). I would like to thank Profs. Rene Provost, David Lametti, and George Fletcher, as well as Gibran Van Ert, for their helpful advice, comments and insights in the preparation of this Paper. Any errors are, of course, my own.

1. See generally *Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, [2002] I.C.J. 3, [2002] 41 I.L.M. 536, available at <http://www.icj-cij.org/cijwww/cdoctet/cCOBE/cCOBEframe.htm> (last visited Nov. 14, 2004).

2. See *H.S.A. v. S.A.*, CA June 26, 2002, at <http://ulb.ac.be/droit/cdi/fichiers/CMA-sharon-260602.pdf> (last visited Nov. 10, 2004); CC Feb. 12, 2003 Bull. crim. No. P.02.1139.F, available at <http://www.universaljurisdiction.info/index/101391> (last visited Nov. 13, 2004); see also Steven R. Ratner, *Belgium's War Crime Statute: A Postmortem*, 97 AM. J. INT'L. L. 888, 890 (2003).

3. See THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Stephen Macedo ed., 2001), at http://www.princeton.edu/~lapa/unive_jur.pdf (last visited Nov. 13, 2004) [hereinafter PRINCETON PRINCIPLES]. An assembly of scholars and jurists from around the world drafted the *Princeton Principles on Universal Jurisdiction* for the purpose of aiding legislators, judges, and government officials in interpreting and applying international law. They believe that implementing these principles will promote justice and reinforce the rule of law. See UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 19-21 (Stephen Macedo ed., 2003).

whether universal jurisdiction *in absentia* should be applied. A majority of the ICJ declined to pronounce on the jurisdictional issue,⁴ the Belgian Courts relied almost exclusively upon domestic law arguments in interpreting its expansive, since-repealed legislation,⁵ and the authors of the *Princeton Principles* deliberately avoided the question altogether.⁶

The purpose of this Article is to provide some clarification of universal jurisdiction *in absentia*. I will begin with a brief overview of the state of international law on the issue, centering on the decision of the minority judges who treated it in the *Arrest*

4. See *Arrest Warrant*, [2002] I.C.J. at 18, [2002] 41 I.L.M. at 547-48.

5. The original Belgian legislation providing for broad universal jurisdiction was *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces conventions* [Law of June 16, 1993 relative to the repression of grave breaches of the Geneva Convention of August 1949 and of additional Protocols I and II of June 8 1977], *MONITEUR BELGE* 17751 (Aug. 5, 1993), available at <http://www.ulb.ac.be/droit/cdi/1993.html> (modifying the 1993 law). See *H.S.A. v. S.A.*, CC Feb. 12, 2003 Bull. crim. No. P.02.1139.F, available at <http://www.universaljurisdiction.info/index/101391> (last visited Nov. 13, 2004) (providing the Belgian *Cour de Cassation* (Supreme Court) decision concerning the case against Ariel Sharon). In 2003, Belgium modified the legislation, narrowing its reach. See *loi du 23 Avril 2003 - loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire* [Law of April 23, 2003 - modifying Law of June 16, 1993 Concerning the Punishment of Grave Breaches of International Humanitarian Law and Article 144 of the Judicial Code] (1), art. 5 (2003) (Belg.) (modifying the 1993 law) [hereinafter Law of June 16, 1993]; see also Glenn Frankel, *Belgian War Crimes Law Undone By Its Global Reach; Case Against Political Figures Sparked Crisis*, WASH. POST, Sept. 30, 2003, at A1.

6. See generally PRINCETON PRINCIPLES, *supra* note 3. Stephen W. Becker, who served as rapporteur to the Drafting Committee and research assistant to Professor M. Cherif Bassiouni (one of the scholars who voted on the proposed principles), writes,

[s]hould the Principles insist at least that the accused is physically present in the territory of the enforcing [S]tate? Should other connecting links also be required? Participants decided not to include an explicit requirement of a territorial link in Principle 1(1)'s definition. This was done partly to allow for further discussion, partly to avoid stifling the evolution of universal jurisdiction, and partly out of deference to pending litigation in the International Court of Justice.

PRINCETON PRINCIPLES, *supra* note 3, at 43. Principle 1(2) of the Princeton project provides that universal jurisdiction may be exercised by a competent and ordinary judicial body of any State in order to try a person duly accused of committing serious crimes under international law as specified in Principle (2)1, *provided the person is present before such judicial body*. See *id.* However, as Becker points out, "[t]he language of Principle 1(2) does not prevent a [S]tate from initiating the criminal process, conducting an investigation, issuing an indictment, or requesting extradition, when the accused is not present." *Id.* at 44.

Warrant decision,⁷ and discuss the applicable principles of international law, international treaties, and custom. I will then briefly examine whether allowing States to exercise universal jurisdiction *in absentia* is consistent with the historical and philosophical justifications for the existence of universal jurisdiction generally. The final section of the Article will discuss the policy implications of such an exercise.

I. THE ICJ RULING: THE ARREST WARRANT CASE

On April 11, 2000, an investigating judge of the Brussels *tribunal de première instance* issued an international arrest warrant *in absentia* against Abdulaye Yerodia Ndombasi,⁸ at that time Minister of Foreign Affairs for the Democratic Republic of the Congo ("D.R.C").⁹ Ndombasi was charged with "grave breaches" of the Geneva Conventions of August 12, 1949,¹⁰ and crimes against humanity pursuant to the Belgian *Loi du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions* [Law of 16 June 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions of August 12 1949 and of Additional Protocols I and II of June 8, 1977].¹¹ The Court alleged that Ndombasi made speeches inciting racial hatred against Tutsi refugees in the D.R.C., referring to them as "vermin" and calling for their extermination.¹²

On October 17, 2000, the D.R.C. instituted proceedings before the ICJ contesting the validity of the international warrant.¹³ Initially, the D.R.C. impugned the validity of the warrant on two grounds. First, it argued, the warrant violated the rule of customary international law that a sitting Minister of Foreign Affairs enjoys absolute immunity from prosecution before foreign

7. See, e.g., *Arrest Warrant*, [2002] I.C.J. at 64, [2002] 41 I.L.M. at 579 (joint separate opinion of Higgins, J., Kooijmans, J. & Buergenthal, J.).

8. See *World Court Won't Axe Warrant for Congo Minister*, CNN.COM, Dec. 8, 2000, at <http://archives.cnn.com/2000/WORLD/africa/12/08/congo.belgium.reut/>.

9. See *Arrest Warrant*, [2002] I.C.J. at 3, [2002] 41 I.L.M. at 538.

10. See Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

11. Law of June 16, 1993, *supra* note 5.

12. See *World Court Won't Axe Warrant for Congo Minister*, *supra* note 8, at ¶ 5.

13. See *Arrest Warrant*, [2002] I.C.J. at 121, [2002] 41 I.L.M. at 543 (noting that the D.R.C.'s final submission drops the jurisdiction argument).

municipal tribunals.¹⁴ Second, the D.R.C. contended Belgium lacked jurisdiction to issue the warrant, since universal jurisdiction could only be exercised if the accused is present in the forum State at the time the warrant is issued.¹⁵ This second argument was subsequently dropped from the Congo's final submissions.¹⁶

The majority of the Court held that the *non ultra petita* rule, by which a court does not address arguments not raised by the parties themselves, prevented the Court from ruling on the jurisdictional issue.¹⁷ It went on to consider the issue of immunity, and concluded that as a matter of customary international law, Ministers of Foreign Affairs enjoy absolute immunity from prosecution in foreign municipal courts while they hold office, and that no exception to this premise existed for war crimes or crimes against humanity.¹⁸

Judges Van den Wyngaert,¹⁹ Higgins, Kooijmans, Buergenthal,²⁰ and Guillaume²¹ disagreed with the majority on the application of the *non ultra petita* rule, holding that the issue of jurisdiction should have been addressed, since it was not possible to conceive of absolute "immunity from the jurisdiction of municipal courts," without determining whether such jurisdiction existed in the first place. In addition, although Judges Bula-Bula,²² Rezek,²³ and Ranjeva²⁴ agreed that the *non ultra petita* rule prevented the Court from ruling on the question of jurisdiction, they nevertheless made passing comments on the subject of universal jurisdiction.

14. *See id.*

15. *See id.*

16. *See id.* See generally Memorial of the Democratic Republic of Congo, [2001] I.C.J. Pleadings, at <http://www.icj-cij.org/cijwww/cdocket/cCOBE/cCOBEframe.htm> (last visited Nov. 14, 2004).

17. *See Arrest Warrant*, [2002] I.C.J. at 18, [2002] 41 I.L.M. at 547-48.

18. *See id.*, [2002] I.C.J. at 24, [2002] 41 I.L.M. at 551.

19. *See id.*, [2002] I.C.J. at 24, [2002] 41 I.L.M. at 633 (dissenting opinion of Van den Wyngaert, J.).

20. *See id.*, [2002] I.C.J. at 64, [2002] 41 I.L.M. at 576 (joint separate opinion of Higgins, J., Kooijmans, J. & Buergenthal, J.).

21. *See id.*, [2002] I.C.J. at 35, [2002] 41 I.L.M. at 558 (separate opinion of President Guillaume).

22. *See id.*, [2002] I.C.J. at 112-13, [2002] 41 I.L.M. at 604-06 (separate opinion of Bula Bula, J.).

23. *See id.*, [2002] I.C.J. at 91-94, [2002] 41 I.L.M. at 592-94.

24. *See id.*, [2002] I.C.J. at 55-59, [2002] 41 I.L.M. at 569-73 (declaration of Ranjeva, J.).

Judge Van den Wyngaert argued that universal jurisdiction *in absentia* was permissible in international law under the decision of the Permanent Court of International Justice ("PCIJ")²⁵ in the *Case of the S.S. "Lotus"*.²⁶ Judges Higgins, Kooijmans, and Buergenthal agreed with Judge Van den Wyngaert, provided that: (1) all applicable immunities are respected; (2) the national State of the accused person is first given the opportunity to act upon the charges alleged; (3) the charges are laid by a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the government of the State; and (4) it is reserved for only the most heinous international crimes.²⁷ Judges Guillaume,²⁸ Ranjeva,²⁹ Rezek,³⁰ and Bula-Bula,³¹ on the other hand, stated that as a matter of customary international law, the exercise of universal jurisdiction requires the presence of the accused.

II. WHO GOT IT RIGHT?

International law traditionally recognizes five types of jurisdiction.³² Territorial jurisdiction exists for the prosecution of crimes committed on State territory ("subjective territorial jurisdiction"), or the effects of which are felt on State territory ("objective territorial jurisdiction").³³ Personal jurisdiction exists for crimes committed by ("active personal jurisdiction") or against ("passive personal jurisdiction") a national of the forum State.³⁴ According to the protection principle, States also have jurisdic-

25. Predecessor to the International Court of Justice, the judicial organ of the United Nations.

26. See *Arrest Warrant*, [2002] I.C.J. at 169-75, [2002] 41 I.L.M. at 635-36 (dissenting opinion of Van den Wyngaert, J.); see also *The Case of the S.S. "Lotus" (Fr. v. Turk.)*, [1927] P.C.I.J. (ser. A) No. 10, at 4, available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/ (last visited Jan. 21, 2005).

27. See *Arrest Warrant*, [2002] I.C.J. at 80-81, [2002] 41 I.L.M. at 586 (joint separate opinion of Higgins, J. Kooijmans, J. & Buergenthal, J.).

28. See *id.*, [2002] I.C.J. at 43, [2002] 41 I.L.M. at 586 (separate opinion of President Guillaume).

29. See *id.*, [2002] I.C.J. at 55, [2002] 41 I.L.M. at 571 (declaration of Ranjeva, J.).

30. See *id.*, [2002] I.C.J. at 92, [2002] 41 I.L.M. at 593 (separate opinion of Rezek, J.).

31. See *id.*, [2002] I.C.J. at 125, [2002] 41 I.L.M. at 611-12 (separate opinion of Bula-Bula, J.).

32. See Maj. Richard Pregent, *Presidential Authority to Displace Customary International Law*, 129 MIL. L. REV. 77, 89 (1990) (describing the four types of jurisdiction).

33. See *id.*

34. See *id.*

tion where an act or offense threatens her security.³⁵ In each of these instances, there is some connection between the prosecuting State and the accused or the act at issue. Universal jurisdiction, by contrast, is exercisable for a small number of crimes against international law, such as piracy, slavery, war crimes, drug trafficking, and genocide.³⁶ Although these crimes do not affect the forum State in particular, they are of such a serious nature that perpetrators may be characterized as enemies of mankind in general, or *hostis humani generis*, and as such, any State has jurisdiction to try them.³⁷

The principles of international law regarding normative jurisdiction were set out by the PCIJ in the *Lotus* Case:

It does not, however follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.³⁸

The general principle in international law is, therefore, that States are free to extend the application of their laws as far as they desire, unless a rule of international law can be found which *prohibits* the exercise of such jurisdiction.

That said, in recent years, the presumption of jurisdiction set out in the *Lotus* decision has been challenged by members of the ICJ. In the *Case Concerning the Legality of the Threat or Use of Nuclear Weapons*, for example, Judges Shahabuddeen³⁹ and

35. See J. MAURICE ARBOUR, *DRIT INTERNATIONAL PUBLIC* 265 (1997).

36. See *id.* at 276.

37. See AMNESTY INT'L, *UNIVERSAL JURISDICTION: THE DUTY TO ENACT AND ENFORCE LEGISLATION* (2001), at <http://web.amnesty.org/library/index/ENGIOR530042001> (last visited Nov. 14, 2004).

38. The Case of the S.S. "Lotus" (Fr. v. Turk.), [1927] P.C.I.J. (ser. A) No. 10, at 4, 18.

39. See Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. 226, 337 (dissenting opinion of Shahabuddeen, J.).

Bedjaoui⁴⁰ expressed doubts as to the doctrine's continued applicability in the contemporary context of globalization, international cooperation, and an increasingly limited conception of State sovereignty. In addition, as Judge Guillaume pointed out in his individual opinion, the PCIJ in the *Lotus* case expressed some doubt as to whether the presumption of jurisdiction applied in the criminal context, and concluded that it was unnecessary to decide this point.⁴¹ Accordingly, it is possible that before asserting universal jurisdiction *in absentia*, States may be required to point to the existence of a positive rule of law that permits this.

Presently, there is no treaty that recognizes the right of States to exercise universal jurisdiction *in absentia*. Most of the treaties that currently provide for universal jurisdiction expressly state that the accused should be found on the territory of the prosecuting State. For example, Article 36(2) of the Single Convention on Narcotics and Drugs, of 1961 provides that:

[s]erious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party *in whose territory the offender is found* if extradition is not acceptable in conformity with the law of the Party to which application is made⁴²

The main exceptions are the Geneva Conventions, none of which explicitly require the accused to be present in the prosecuting State. Rather, each states that "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."⁴³ The use of the words

40. See *Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. at 270 (Declaration of President Bedjaoui).

41. See Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), [2002] I.C.J. 3, 43, [2002] 41 I.L.M. 536, 559 (separate opinion of President Guillaume).

42. See *Arrest Warrant*, [2002] I.C.J. at 72, [2002] 41 I.L.M. at 581 (joint separate opinion of Higgins, J., Kooijmans, J. & Buerghenthal, J.) (emphasis added) (citation omitted); see also LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 44 (2003) [hereinafter REYDAMS, *UNIVERSAL JURISDICTION*] (pointing out that requiring the presence of the accused in the forum State in international treaties that provided for the exercise of universal jurisdiction can be traced to the early 20th century).

43. Geneva Convention for the Amelioration of the Condition of the Wounded

“search for,” however, implies that parties to the Convention have an obligation to prosecute the perpetrators “found” as a result of investigations *in their territory*.⁴⁴

Customary international law is unclear on the subject of universal jurisdiction *in absentia*.⁴⁵ The dearth and inconsistency of State practice on the issue prevent any definitive conclusions from being reached at this time. A majority of the States that have implemented the various conventions establishing universal jurisdiction in their national legislation expressly require the presence of the offender on their territory before asserting jurisdiction.⁴⁶ For example, Article 689-1 of the French Penal Code

and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146(2), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Two more exceptions are the Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 28, May 14, 1954, 249 U.N.T.S. 215, which provides that “[t]he High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention,” and the Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 516 U.N.T.S. 205, which provides that “[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board”

44. See *Arrest Warrant*, [2002] I.C.J. at 71, [2002] 41 I.L.M. at 581 (joint separate opinion of Higgins, J., Kooijmans, J. & Buergenthal, J.); see also REYDAMS, *UNIVERSAL JURISDICTION*, *supra* note 42, at 55. Reydamas points out that the second sentence of the provisions in question reads, “[i]t may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.” *Id.* This text seems, at least at first blush, to imply that a third State (i.e., a State other than the one in which an accused is found) may initiate proceedings against him or her. As Reydamas points out however, this argument is undermined by the fact that the words “Other High Contracting Party” are qualified by the adjective “concerned,” implying that there must be a special link, be it personal or territorial, between them and the grave breach which is in issue. See *id.*

45. Customary law and conventional law are the primary sources that make up international law. See THE LEGAL INFORMATION INSTITUTE, *INTERNATIONAL LAW: AN OVERVIEW*, (2004), at <http://www.law.cornell.edu/topics/international.htm> (last visited Nov. 14, 2004). “Customary international law results when [S]tates follow certain practice generally and consistently out of a sense of legal obligation . . . [as opposed to] conventional law, [which] derives from international agreements and may take any form that the contracting parties agree upon.” *Id.*

46. See REYDAMS, *UNIVERSAL JURISDICTION*, *supra* note 42, at 221.

provides, “[p]ursuant to the international conventions referred to below, any person who renders himself guilty outside the territory of the Republic of any of the offences enumerated in those article may, *if in France*, be prosecuted and tried by French courts . . .”⁴⁷ Similarly, Section Eight of the Canadian Crimes Against Humanity and War Crimes Act states that “[a] person who is alleged to have committed an offence under [S]ection [Six] or [Seven] may be prosecuted for that offense if . . . after the time the offense is alleged to have been committed, *the person is present in Canada*.”⁴⁸ The Australian War Crimes Act of 1945, as amended in 1988, is even more restrictive, and requires that the accused be an Australian resident or citizen at the time of committing the offense.⁴⁹

There is also domestic case law declaring that an accused must be within a forum State before it may exercise universal jurisdiction. In Germany, for example, courts have held that in order for the federation to exercise universal normative jurisdiction there must be some “link” between the accused and the State, such as the presence of the accused in the country. In *Public Prosecutor v. Jorgic*,⁵⁰ a German Court convicted a Bosnian Serb living in Germany of war crimes, holding that Germany could exercise universal jurisdiction, as the accused had been

47. Code de procédure pénale [Criminal Procedure Code], art. 689-1 (1992) (Fr.) (emphasis added). Article 689-1 states:

En application des conventions internationales visées aux articles suivants peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumérées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable.

[Applying the international conventions alluded to in the following articles, can be prosecuted and sentenced by the French courts, if located in France, any person that would be guilty of a breach outside of the territory of the Republic of one of the breach listed in these articles. The provisions of this article are applicable for the attempt to breach, each time that one is punishable.]

Id.

48. Crimes Against Humanity and War Crimes Act, R.S.C., ch. 24 (2000) (Can.) (emphasis added).

49. See War Crimes Act, No. 48 (1945), amended by the War Crimes Amendment Act, No. 3 (1989) (Austl.); see also Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), [2002] I.C.J. 3, 69, [2002] 41 I.L.M. 536, 79 (joint separate opinion of Higgins, J., Kooijmans, J. & Buergenthal, J.) (noting statute provides for the prosecution of Australian citizens for war crimes committed between 1939 and 1945).

50. See REYDAMS, UNIVERSAL JURISDICTION, *supra* note 42, at 152-56 (citation omitted) (discussing *Public Prosecutor v. Jorgic*, BayObLG Düsseldorf, Sept. 26, 1997)).

voluntary residing in Germany at the time of his arrest.⁵¹

In 1998, the Federal Supreme Court further ruled that two nationals of the former Yugoslavia could not be prosecuted in Germany for genocide or grave breaches of the Geneva Conventions allegedly committed in the Balkans against non-German nationals unless they were present in Germany.⁵² The Court held that there was no "meaningful point of contact" with Germany to ground an exercise of jurisdiction, adding "[i]t is quite another thing when the offender is present in Germany; in that case there is an internationally undisputed linking point for the exercise of jurisdiction."⁵³

The French and Dutch courts have adopted a similar position.⁵⁴ In *In re Javor*,⁵⁵ certain Bosnian nationals filed a complaint concerning the torture inflicted upon them in a Serbian detention camp.⁵⁶ Specific perpetrators were not named.⁵⁷ The *Cour de Cassation* upheld the decision of the *Cour d'Appel*, holding that authorities could not initiate prosecutions unless the accused was present in French territory.⁵⁸ In *In re Bouterse*,⁵⁹ the Dutch Supreme Court came to a similar conclusion, holding that the Netherlands could not prosecute the former leader of Suriname for war crimes, since he was not present in the Netherlands at any stage in the proceedings.⁶⁰ The Danish Director of prosecution declined to indict Augusto Pinochet for the same

51. *See id.*

52. *See id.* at 151-52 (discussing case of *X v. S & DB*, BGH, Dec. 11, 1998). The Federal Supreme Court cast doubt upon this position in the subsequent case of *Public Prosecutor v. Sokolovic*, BGH, Feb. 21, 2001. *See id.* at 155-56.

53. *See id.*

54. *See, e.g., In re Javor*, Cass. Crim., Mar. 26, 1996, 95-81527, available at <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRAX1996X03X06X00132X000> (last visited Nov.14, 2004).

55. CA Paris, Nov. 24, 1994, Bull. Crim. 1996, No. 132, 279, at <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRAX1996X03X06X00132X000> (last visited Nov.14, 2004); *see also* Brigitte Stern & Bernard Oxman, *International Decision: In re Javor*, 93 AM. J. INT'L. L. 525 (1999).

56. *See Javor*, CA Paris, Nov. 24, 1994, Bull. Crim. 1996, No. 132, 279.

57. *See id.*

58. *See Javor*, Cass. Crim., Mar. 26, 1996, 95-81527.

59. Hof, Amsterdam, Nov. 20, 2000, Nos. R 97/163/12 Sv and R 97/176/12 Sv, ¶ 5.4, available at http://www.universaljurisdiction.info/index/Cases/Cases/Netherlands_-_Bouterse_case/Case_Doc_Summaries/143713,0 (summarizing *Bouterse* case); *see also* REYDAMS, UNIVERSAL JURISDICTION, *supra* note 42, at 173 n.51 (discussing *Bouterse* case).

60. *See* REYDAMS, UNIVERSAL JURISDICTION, *supra* note 42, at 178.

reason in *Lee Urzua v. Pinochet*,⁶¹ and finally, in *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No. 3), Lord Millett of the British House of Lords wrote that, "the limiting factor that prevents the exercise of extra-territorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another [S]tate is that, for the trial to be fully effective, the accused must be present in the forum [S]tate."⁶²

While it is true that the foregoing analysis suggests that no custom has of yet emerged permitting the exercise of universal jurisdiction *in absentia*, this hardly amounts to evidence that there is a custom prohibiting such exercise. The most that can be said is that States have rarely exercised such jurisdiction. It must be remembered that State practice is only one of the two elements that must be present for a customary rule of international law to exist. The other is *opinion juris*.⁶³ As the PCIJ wrote in the *Lotus* case:

Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for *only if such abstentions were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom*.⁶⁴

The failure of States to exercise universal jurisdiction *in absentia* is quite possibly attributable to considerations such as political convenience, public opinion, desire to avoid overburdening their judicial systems, and the practical challenges associated with gathering evidence and witnesses in distant States.⁶⁵ With-

61. See *id.* at 127, 129 (discussing the Danish case against Pinochet).

62. *Regina v. Bartle and the Commissioner of Police for the Metropolis & Others Ex Parte Pinochet*, 2 All E.R. 97 (H.L. 1999).

63. A law is "customary" when it can be shown that a State or States have acted consistently in accordance with it, and the existence of *opinio juris*, that the State or States feels bound by it. See generally Julia Edwards, *Background of the International Court of Justice* (2004), at <http://www.usm.maine.edu/~kuzma/mun/icj/icjpacket.htm> (last visited Nov. 14, 2004).

64. The Case of the S.S. "Lotus" (Fr. v. Turk.), [1927] P.C.I.J. (ser. A) No. 10, at 4 (emphasis added).

65. For a summary of specific instances in which States have declined to prosecute

out more extensive evidence, it is impossible to say for sure. It has arguably not been the product of any conscious belief that there is a custom prohibiting the exercise of universal jurisdiction *in absentia*.⁶⁶

If it is unclear whether custom prohibits the exercise of *in absentia* jurisdiction, it is equally unclear whether or not it permits such an exercise. That being said, State practice in recent years has increasingly supported the view that States may exercise universal jurisdiction *in absentia* if they so desire.⁶⁷ Thus, for example, Section 8(1)(c)(iii) of the New Zealand International Crimes and International Criminal Court Act 2000, states that “[p]roceedings may be brought for an offence . . . whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.”⁶⁸ Article 7 of the Belgian *Loi du 16 juin 1993 relative à la répression des violations*

for these reasons, see AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: THE DUTY TO ENACT AND ENFORCE JURISDICTION* (2001), at <http://web.amnesty.org/library/index/engior530172001?OpenDocument> (last visited Nov. 14, 2004).

66. As Judge Van den Wyngaert alludes to in her dissenting opinion in the *Arrest Warrant Case*, the French Minister explained his opposition to a proposed amendment to the French Penal Code allowing for universal jurisdiction *in absentia*:

[e]n effet, si l'on retenait sa proposition, nombre des victimes vivant en France déposeraient plainte, pour la plupart devant le tribunal de grande instance de Paris. Cela provoquerait un embouteillage considérable qui aboutirait à l'effet inverse de celui recherchée, car certaines exactions qui pourraient être sanctionnées ne le seraient jamais à cause de cet encombrement artificiel. Nous sommes donc d'accord là face à un problème pratique.

[Indeed, if we retained his proposal, many victims living in France would file complaints, most of them in front of the courts of first instance of Paris. This would lead to considerable congestion that would produce an effect opposite of the one intended, because some violation that could have been sanctioned would not be, due to the artificial congestion. We are thus facing a very practical problem.]

Counter Memorial of the Kingdom of Belgium (Congo v. Belg.), [2001] I.C.J. Pleadings, ¶ 3.3.63 (citing legislative history in which the French Minister opposes universal jurisdiction because it will generate too much litigation). See Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), [2002] I.C.J. 3, 172 n.121, [2002] 41 I.L.M. 536, 637 n.121 (dissenting opinion of Van den Wyngaert, J.) (alluding to legislative history from *Journal officiel de l'Assemblée Nationale* [Official Journal of the National Assembly], 20 décembre 1994, 2e séance, at 9446, cited by Belgium in its Counter Memorial to the Court).

67. See generally Counter Memorial of the Kingdom of Belgium (Congo v. Belg.), [2001] I.C.J. Pleadings.

68. *Id.* (citing Section 8(1)(c)(iii) of the New Zealand International Crimes and International Criminal Court Act of 2000).

graves de droit international humanitaire,⁶⁹ which provided the basis for the international arrest warrant which was the subject of the ICJ decision,⁷⁰ provided in unambiguous terms for the exercise of universal jurisdiction *in absentia* in cases involving certain violations of international humanitarian law, but was repealed in August 2003⁷¹ under political pressure. Currently, Belgian law

69. *Loi du 16 juin 1993 relative à la répression des infractions graves de droit international humanitaires aux Conventions Internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions* [Law of June 16, 1993 Relative to the Repression of Grave Breaches of the Geneva Convention of August 1949 and of Additional Protocols I and II of June 8, 1977], *MONITEUR BELGE* 17751 (Aug. 5, 1993), at www.ulb.ac.be/droit/cdi/1993.html (last visited Nov. 14, 2004) (“*ses juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu ou celles-ci auront été commises.*” [the Belgian courts are competent to hear the breaches foreseen by this law, without regard to the place where the breach occurred.])

70. See *Arrest Warrant*, [2002] I.C.J. at 9, [2002] 41 I.L.M. at 541-42.

71. See *Loi du 23 Avril 2003 — loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire* [Law of April 23, 2003 — modifying law of June 16, 1993 Concerning the Punishment of Grave Breaches of International Humanitarian Law and Article 144 of the Judicial Code] (1), art. 5 (2003) (Belg.) (modifying art. 7. § 1 of the 1993 draft). Article 5 states:

“*Sous réserve d'un dessaisissement prononcé dans un des cas prévus aux paragraphes suivants, les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu où celles-ci auront été commises et même si l'auteur présumé ne se trouve pas en Belgique.*

L'action publique ne pourra toutefois être engagée que sur réquisition du procureur fédéral lorsque :

1° *l'infraction n'a pas été commise sur le territoire du Royaume;*

2° *l'auteur présumé n'est pas belge;*

3° *l'auteur présumé ne se trouve pas sur le territoire du Royaume et*

4° *la victime n'est pas belge ou ne réside pas en Belgique depuis au moins trois ans.*

Saisi d'une plainte en application de l'alinéa 2, le procureur fédéral requiert du juge d'instruction qu'il instruisse cette plainte, sauf si :

1° *la plainte est manifestement non fondée ou*

2° *les faits relevés dans la plainte ne correspondent pas à une qualification de la présente loi; ou*

3° *une action publique recevable ne peut résulter de cette plainte, ou*

4° *des circonstances concrètes de l'affaire, il ressort que, dans l'intérêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l'Etat dont l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction est compétente, indépendante, impartiale et équitable.”*

[Subject to dismissal in accordance with the facts foreseen in the following paragraphs, Belgian judges have jurisdiction to hear of the breaches under that law, no matter the place where these breaches would have occurred or if the presumed perpetrator is located in Belgium. Public prosecution will however only be engaged on the requisition of the federal prosecutor when:

1° the breach has not been committed in the territory of the Kingdom;

only provides for the possibility of exercising universal jurisdiction *in absentia* where the country is required to prosecute as a matter of international law (customary or treaty-based),⁷²

2° the presumed doer is not Belgian

3° the presumed doer is not in the territory of the Kingdom;

4° the victim is not Belgian or has not lived in Belgium for at least three years.

If dealing with a complaint under paragraph 2, the federal prosecutor must ask the magistrate to examine the complaint except if:

1° the complaint is evidently unfounded; or

2° the facts described in the complaint are not to qualify under this law; or

3° an admissible public prosecution can not result from the complaint, or

4° specific circumstances in the case, in the interest of justice and in respect of international agreements of Belgium, this case would be brought to the jurisdiction where the facts took place, or in front of the jurisdiction of the State in which the perpetrator is a national or the place where he could be found, and in as much as this jurisdiction is competent, independent, impartial and equitable.]

Id.

72. *Loi contenant le titre préliminaire du code de procédure pénal* [Criminal Procedure Code of Belgium], art. 12. (2003) (Belg.). Article 12 states:

Sauf dans les cas prévus (article 6, 1°, 1° bis et 2°, article 10, 1°, 1° bis et 2° et article 12bis), ainsi qu'à l'article 10bis, la poursuite des infractions dont il s'agit dans le présent chapitre n'aura lieu que si l'inculpé est trouvé en Belgique.

Art. 12bis. (Hormis les cas visés aux articles 6 à 11, les juridictions belges sont également compétentes) pour connaître des infractions commises hors du territoire du Royaume et visées par une (règle de droit international conventionnelle ou coutumière) (ou une règle de droit dérivé de l'Union européenne) liant la Belgique, lorsque (cette règle) lui impose, de quelque manière que ce soit, de soumettre l'affaire à ses autorités compétentes pour l'exercice des poursuites.)

(Les poursuites, en ce compris l'instruction, ne peuvent être engagées qu'à la requête du procureur fédéral qui apprécie les plaintes éventuelles. Il n'y a pas de voie de recours contre cette décision.

Saisi d'une plainte en application des alinéas précédents, le procureur fédéral requiert le juge d'instruction d'instruire cette plainte sauf si :

1° la plainte est manifestement non fondée; ou

2° les faits relevés dans la plainte ne correspondent pas à une qualification des infractions visées au livre II, titre Ibis, du Code pénal (ou à toute autre infraction internationale incriminée par un traité liant la Belgique); ou

3° une action publique recevable ne peut résulter de cette plainte; ou

4° des circonstances concrètes de l'affaire, il ressort que, dans l'intérêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l'Etat dont l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction présente les qualités d'indépendance, d'impartialité et d'équité, tel que cela peut notamment ressortir des engagements internationaux relevant liant la Belgique et cet Etat [. . .]."

[Except in cases authorized by law (article 6, 1°, sub-1° and 2°, article 10, 1°, sub-1° and 2° and article sub-12), as well as at article sub-10, the proceedings described in this Chapter will not occur if the accused is not located in Belgium

though this would appear to cover an extremely narrow class of cases.

A new State has taken Belgium's vanguard position, however, in providing for universal jurisdiction *in absentia*. In 2002, Germany enacted its *Völkerstrafgesetzbuch* [Code of Crimes against International Law], of which Article 1 provides, "[t]his Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad *and bears no relation to Germany*."⁷³ This last phrase was intended to overrule the jurisprudence of the Federal Supreme Court canvassed previously, which required that there be some link with Germany, such as the presence of the accused at the time proceedings are initiated at a minimum.⁷⁴

Finally, it should be noted that many countries have adopted legislation implementing international criminal law that is entirely silent on the issue; thus, while they do not expressly allow for the possibility, they have also not ruled it out,⁷⁵ leaving their national courts the option of allowing proceedings *in absentia* to proceed.

The proceedings, including the search for evidence, can be instigated only at the request of the federal prosecutor who assesses the complaint. There is no right of review of that decision.

Article sub-12 (Except for the cases aimed at articles 6 to 11, Belgium courts are also competent) to hear of the breaches that occurred outside of the territory of the Kingdom and aimed by (rule of international law conventional or customary) (or a rule of law derived from the European Union) linked to Belgium, when (this rule) imposed by any means, to file the suit with Belgium competent authorities in order to exercise the lawsuit.]

Id.

73. Gesetz zur Einführung des Völkerstrafgesetzbuches [Act to Introduce the Code of Crimes Against International Law] v. 26.06.2002 (BGBl. I S. 2254) (emphasis added). See Gerhard Werle and Florian Jessberger, *International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law*, 13 CRIM. L. F. 191, 214 (2002).

74. According to an explanatory memorandum by Reydam's, the application of German criminal law to extraterritorial acts that constitute an offense under the *Völkerstrafgesetzbuch* ("VStGB") is "not dependent on the existence of a special domestic connection. Because the Federal Supreme Court has so far given a different interpretation to VStGB § 6, the unambiguous wording of VStGB § 1 now makes it very clear that offences under the VStGB, in any event, do not require a special domestic link." REYDAMS, UNIVERSAL JURISDICTION, *supra* note 42, at 145.

75. See Counter Memorial of the Kingdom of Belgium (Congo v. Belg.), [2001] I.C.J. Pleadings, ¶ 3.3.57 (Sept. 28, 2001) (discussing Penal Code of Bolivia giving national courts universal competence); see also REYDAMS, UNIVERSAL JURISDICTION, *supra* note 42, at 183-92 (discussing Spanish criminal law).

With respect to municipal case law, the Dutch Court of Appeal explicitly held in *In re Bouterse*⁷⁶ that the exercise of universal jurisdiction did not require Bouterse's presence in the Netherlands (although the decision was later overturned).⁷⁷ Second, in *Demjanjuk v. Petrovsky*,⁷⁸ the U.S. Sixth Circuit Court of Appeals held that an alleged Nazi war criminal could be extradited to Israel, since that Nation, in addition to "any other [N]ation" was entitled to exercise universal jurisdiction despite Demjanjuk's presence in the United States.⁷⁹ On November 5, 1998, the Criminal Division of the Spanish National Court held unanimously that Spain has jurisdiction to try the crimes committed by former Chilean president Augusto Pinochet.⁸⁰ Although some of the alleged victims were Spanish nationals, the court relied on the principle of universal jurisdiction, rather than passive personal jurisdiction, in its conclusions, despite the fact that Pinochet was not present in Spain.⁸¹ Finally, before the Belgian legislation referred to above was repealed, its *Cour de Cassation*, overturning a Court of Appeal decision,⁸² confirmed that it permitted the exercise of universal jurisdiction over certain crimes.⁸³

In summary, there is no consensus on whether international law currently permits the exercise of universal jurisdiction *in ab-*

76. *In re Bouterse*, Hof, Amsterdam, Nov. 20, 2000, Nos. R 97/163/12 Sv and R 97/176/12 Sv, ¶ 5.4, available at http://www.universaljurisdiction.info/index/Cases/Cases/Netherlands_-Bouterse_case/Case_Doc_Summaries/143713,0 (last visited Nov. 14, 2004) (summarizing *Bouterse* case).

77. See REYDAMS, UNIVERSAL JURISDICTION, *supra* note 42, at 178.

78. 776 F.2d 571, 584 (6th Cir. 1985).

79. *Id.* at 583.

80. See *In re Pinochet*, *Audencia Nacional*, *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena* [Spanish National Court, Criminal Division, confirming the jurisdiction of Spain to hear the crimes of genocide and terrorism committed during the Chilean dictatorship], Case 1/98, Nov. 5, 1998, available at <http://www.derechos.org/nizkor/chile/juicio/audi.html> (last visited Nov. 14, 2004).

81. See *id.*

82. *In re Sharon*, CA June 26, 2002, at <http://ulb.ac.be/droit/cdi/fichiers/CMA-sharon-260602.pdf> (last visited Nov. 10, 2004). In reaching the decision, the Court of Appeals relied primarily on domestic law. It did, however, make some pronouncements on the right to exercise universal jurisdiction *in absentia* under international law. See *id.* Unfortunately, it did not come to any clear conclusions on this point. In certain parts of the judgment, it appears to cast doubt upon the existence of such a right, while in others it appears more sympathetic. See *id.*

83. *H.S.A. v. S.A.*, CC Feb. 12, 2003 Bull. crim. No. P.02.1139.F, available at <http://www.universaljurisdiction.info/index/101391> (last visited Nov. 13, 2004).

sentia. This is due to ambiguity on the following three points: (1) whether or not the principles set out in the *Lotus* case continue to apply; (2) if they do, whether or not a customary law has crystallized, or is in the process of crystallizing, that would bar the exercise of *in absentia* universal jurisdiction, and if not; (3) whether or not customary law has emerged, or is in the process of emerging, that would explicitly permit it.

III. HISTORICAL AND PHILOSOPHICAL RATIONALES OF THE CONCEPT OF UNIVERSAL JURISDICTION

Universal jurisdiction in its current incarnation has well-developed historical roots, so an examination of those roots may be a useful guide in our understanding of more current developments in this area. Grotius argued that violations of the rules of natural law constituted offenses against all *societas generis humani*, or universal society of humanity. He argued that all States had an interest, and even a duty, to punish international crimes.⁸⁴ This view has been articulated in the fourth paragraph of the preamble to the *Rome Statute of the International Criminal Court* (1998) which affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."⁸⁵ Under this conception of "international community," since all States are interested parties in cases involving the commission of certain serious crimes, there is no reason to

84. See HUGO GROTIUS, 3 DE JURE BELLI AC PACIS 504 (1925). Grotius wrote: Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have Authority over others, but as they are in Subjection to none. For . . . it is so much more honorable, to revenge other Peoples Injuries rather than their own . . . Kings, beside the Charge of their particular Dominions, have upon them the care of human Society in general.

Mark S. Zaid, *Universal Jurisdiction: Myths, Realities, and Prospects: Will or Should the United States Ever Prosecute War Criminals?*, 35 NEW ENG. L. REV. 447, 449-50 (2001) (citing GROTIUS, *supra*, at 504).

85. Rome Statute of the International Criminal Court, art. 4, U.N. Doc. No. A/CONF.183/9 (1988).

insist on any special link between the victim, the offender, and that State in order for universal jurisdiction to be exercised.⁸⁶

By contrast, two other prominent historical rationales for universal jurisdiction support the view that it should not be extended to cases where the accused is not present on the territory of the forum State. The first view is illustrated by the following statement by Donnedieu de Vabres:

*Néanmoins, il fut admis pendant tout le moyen âge, dans la doctrine italienne, et dans le droit qui gouvernait les rapports des villes lombardes, qu'à l'égard de certaines catégories de malfaiteurs dangereux – [banniti, vagabundi, assassini,] – la simple présence, sur le territoire, du criminel impuni, étant une cause de trouble, donnait vocation à la cité pour connaître de son crime.*⁸⁷

[It was recognized during the middle ages, however, according to the Italian doctrine, and in the law that used to govern relationships between lombardic cities, that regarding a certain category of dangerous criminals – [bandits, vagabonds, assassins,] – just the presence on the territory of an unpunished criminal, was a cause of trouble, sufficient to give a right to the city to prosecute the crime.]

Jurists of the Middle Ages assumed that certain dangerous criminals posed a threat to the societies in which they were found, presumably since they were likely to commit repeat offenses. For this reason, these jurisdictions were entitled to investigate and prosecute crimes committed by these actors in other jurisdictions. Therefore, the accused's presence in the jurisdiction and the danger he posed in that jurisdiction justified the exercise of universal jurisdiction.⁸⁸

Judge Guillaume, in his individual opinion in *Arrest War-*

86. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 685 (1988).

87. HENRI DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DE DROIT PENAL INTERNATIONAL* 135, 136 (1928). According to De Vabres, the principle of universal jurisdiction traces its origins to the Justinian Civil Code, which recognized the jurisdiction of the district where a crime was committed, or where the accused was apprehended. See *id.* at 135.

88. See AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION* (2001), at <http://web.amnesty.org/library/index/engior530042001> (last visited Nov. 14, 2004) (discussing universal jurisdiction in the Middle Ages).

rant,⁸⁹ outlines a second historical justification for a more restrictive version of universal jurisdiction. He writes:

The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on the subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that *the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable*. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge.⁹⁰

Thus, the basis for asserting universal jurisdiction lay in the impact of the accused's presence in the prosecuting State. Permitting the perpetrators of heinous crimes to remain in their State and be rewarded for fleeing States that could otherwise exercise jurisdiction, could cause public outrage. Alternatively, this might be perceived as an endorsement of such individuals' conduct and have a harmful effect on public morals.

IV. POLICY IMPLICATIONS

The recognition of universal jurisdiction *in absentia* would have three principal consequences. First, the exercise of universal jurisdiction in general would become more frequent as all States would become empowered to try serious international crimes. While this might have the advantage of reducing the im-

89. See Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), [2002] I.C.J. 3, [2002] 41 I.L.M. 536 (separate opinion of President Guillaume).

90. *Arrest Warrant*, [2002] I.C.J. at 36, [2002] 41 I.L.M. at 559 (separate opinion of President Guillaume) (emphasis added). De Vabres makes a similar point: "[i]l intervient, à défaut de tout autre État, pour éviter, dans un intérêt humain, une impunité scandaleuse" [he intervenes in the interest of mankind, failing that any other State would, in order to avoid a scandalous impunity]. H. DONNEDIEU DE VABRES, *supra* note 87, at 135 (emphasis added). See REYDAMS, *UNIVERSAL JURISDICTION*, *supra* note 42, at 31. Maurice Travers endorsed both views, writing, "[t]he example of an offender peacefully enjoying the benefits of his misdeed encourages criminality and the possibility of an offender taking refuge in a State with the certainty that its penal law will not be applied would attract riffraff to hospitable countries, necessarily impacting their social order. . . ." REYDAMS, *UNIVERSAL JURISDICTION*, *supra* note 42, at 33 (quoting and translating MAURICE TRAVERS, 1 *LE DROIT PENAL INTERNATIONAL ET SA MISE EN OEUVRE EN TEMPS DE PAIX ET EN TEMPS DE GUERRE* [International Criminal Law and its Implementation in Times of Peace and in Times of War] 75 (1920)).

punishment currently enjoyed by the perpetrators of heinous crimes, it would also raise concerns regarding the stability of international relations,⁹¹ multiple prosecutions,⁹² disproportionate use against non-Western nationals,⁹³ and the future role of the International Criminal Court ("ICC").

Second, the recognition of universal jurisdiction *in absentia* would be likely to increase the effectiveness with which international crimes are investigated and prosecuted.⁹⁴ States seeking to exercise universal jurisdiction would not be required to wait for the accused to travel to their country before initiating legal proceedings. It has been argued that this would have important implications regarding the extent to which criminals are able to avoid justice for extended periods of time, and also facilitate the gathering of evidence necessary for obtaining convictions.

Third, it is arguable that the recognition of universal jurisdiction *in absentia* would increase the scope for prosecuting international criminals *in absentia*. While investigations *in absentia* are relatively common and uncontroversial in international law, the same cannot be said of trials *in absentia*, which raise serious legal and policy concerns.

A. More Frequent Exercise of Universal Jurisdiction

If States such as Belgium are entitled to initiate proceedings in the absence of the accused, it makes sense that they will do so with increasing frequency. Advocates of a broad conception of universal jurisdiction argue that this will have the advantage of decreasing the extent to which international criminals enjoy impunity. It is clear that in most cases, the exercise of universal jurisdiction *in absentia* would not lead to the incarceration or extradition of defendants, particularly when they remain in their home States, which will likely refuse extradition.⁹⁵ However,

91. See Micaela Frulli, *The I.C.J. Judgment on the Belgium v. Congo Case (14 February 2002): A Cautious Stand on Immunity from Prosecution for International Crimes*, 3 GER. L.J. 3, ¶ 9 (2002).

92. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 90 (2001).

93. See M. O. Chiloundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1141 (1999).

94. Cf. Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 268-69 (1994) (noting that the case against the defendant becomes weaker as time passes).

95. In the absence of a treaty obligation, extradition is subject to the discretion of

Bruce Broomhall has argued that the stigma associated with investigations and prosecutions, even *in absentia*, will in some measure punish criminals, and have the effect of deterring those crimes for which universal jurisdiction exists.⁹⁶

Broomhall has also argued that investigations and prosecutions *in absentia* will provide relief for victims and their families even if the proceedings would not necessarily result in the incarceration of the accused.⁹⁷ Forum States would serve as "truth commissions," providing a permanent record of crimes such as torture, war crimes, and genocide. As Richard Goldstone has stated, in relation to Rule 61 proceedings that reconfirm indictments despite the accused's failure to appear, "[t]here can be no justification for ignoring the rights of the victims and of their families. They too have a right to be heard and thereby begin their own healing process and that of many tens of thousands of victims who will identify with them."⁹⁸

Namoi Roht-Arriaza has suggested that the increasing ability of foreign countries to assert jurisdiction will have an catalyzing effect on States where crimes have been committed (and where the accused often continues to reside), increasing the likelihood that the accused will actually be brought to trial and punished.⁹⁹ Following the indictment of Augusto Pinochet and retired Argentinean Navy Captain Adolpho Scilingo, in the Spanish National Court, 280 complaints were brought by individuals against Pinochet in Chile.¹⁰⁰ In addition, the Chilean Supreme Court approved stripping Pinochet of his parliamentary immunity.¹⁰¹

the requested State. See Bruce Broomhall, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 415 (2001).

96. See *id.* at 417.

97. See *id.*

98. Mark Thieroff & Edward A. Amley, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231, 247 (1998) (quoting Richard Goldstone, former Justice of the Constitutional Court of South Africa and a Chief Prosecutor of the Rwanda and Yugoslavia tribunals).

99. See Naomi Roht-Arriaza, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 316 (2001).

100. See Sheema Kahn, *Welcome Ex-Dictators, Torturers and Tyrants: Comparative Approaches to Handling Ex-Dictators and Past Human Rights Abuses*, 37 GONZ. L. REV. 167, 188-89 (2001).

101. See *id.*

The Spanish case turned the issue into a topic of national conversation, which in turn led to the institution of a dialogue roundtable on the subject among military leaders, human rights lawyers, and representatives of civil society.¹⁰² The Spanish action also led to a strengthening of the anti-impunity movement in Argentina,¹⁰³ that has led to, *inter alia*, the repeal of legislation barring the prosecution of Argentinean military officers¹⁰⁴ and the introduction of legislation expanding the reparations offered to survivors of Argentinean concentration camps.¹⁰⁵

While there are therefore some clear benefits to the recognition of universal jurisdiction *in absentia*, increasing the frequency with which this type of jurisdiction is exercised will pose the risk of undermining the stability of international relations. The home State of the accused, or where he or she allegedly committed the crime, is likely to view the assertion of universal jurisdiction by foreign Nations as an unwarranted intervention in its internal affairs. This risk is even more acute in States that allow for the initiation of criminal proceedings by private individuals (*actio popularis*) or where the government does not tightly control prosecutors. In these countries, the institution of proceedings by prosecutors or private citizens could alienate States that the government would not normally risk offending through the exercise of universal jurisdiction.¹⁰⁶ This effect would be exacerbated if future decisions by international tribunals adopt Judges Higgins, Kooijmans, and Buergenthal's requirement that prosecutors must act "in full independence, without links or control by the government of that State"¹⁰⁷ in order for universal jurisdiction *in absentia* to be exercised, as governments would be unable to stay the prosecutions that threaten the stability of their international relationships with other States.

102. See Roht-Arriaza, *supra* note 99, at 316-17.

103. See *id.* at 316.

104. See *id.* at 312.

105. See *id.* at 316.

106. However, it should be noted that in many States the prosecutor, who is generally subject to government control, possesses an executive veto on proceedings instituted by individuals. See generally Micah S. Myers, *Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations*, 25 MICH. J. INT'L L. 211 (2003).

107. See Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), [2002] I.C.J. 3, 80, [2002] 41 I.L.M. 536, 575 (joint separate opinion of Higgins, J., Kooijmans, J. & Buergenthal, J.).

In addition, States might abuse universal jurisdiction to prosecute the nationals of enemy States as a means of gaining a political advantage or impugning their reputation in the international community.¹⁰⁸ In some cases, States might initiate investigations and prosecutions even where the allegations against an accused are clearly baseless. As a result, the exercise of universal jurisdiction *in absentia* is likely to exacerbate tensions between States currently involved in a conflict.¹⁰⁹

Another concern raised by the recognition of universal jurisdiction *in absentia* is that multiple prosecutions of the same individual would ensue, as the number of States entitled to exercise jurisdiction would substantially increase. While it is true that the possibility of multiple prosecutions already exists as a necessary incident to the existence of extra-territorial forms of jurisdiction such as personal or objective territorial jurisdiction, the number of prosecutions in the cases of universal jurisdiction would be virtually unlimited. In practice, many States would not initiate proceedings, due to the high costs associated with investigating crimes committed in another country.¹¹⁰ Some States, however, such as Belgium,¹¹¹ and more recently Germany,¹¹² have demonstrated a commitment to exercising universal jurisdiction. Increasing the number of prosecutions and investigations would inevitably lead to conflicts over access to evidence and to the accused, and would increase the likelihood of conflicting decisions, which would undermine the legitimacy of the judicial systems in all States that have exercised jurisdiction.

Western Nations have traditionally exercised universal jurisdiction to prosecute non-Western nationals and leaders.¹¹³

108. See Madeline H. Morris, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 355 (2001).

109. For example, on October 23, 2000, the Arab league released a statement indicating its intention to "pursue, in accordance with international law, those responsible for these brutal practices." *Id.* at 355-56 (referring to alleged Israeli crimes against Palestinians).

110. See Talitha Gray, *To Keep You Is No Gain, to Kill You Is No Loss: Securing Justice through the International Criminal Court*, 20 ARIZ. J. INT'L & COMP. L. 645, 660-62 (2003) (discussing expenses associated with creating domestic courts capable of trying war crimes).

111. See *supra* notes 8-30, 68-71 and accompanying text.

112. See *supra* notes 72-74 and accompanying text.

113. See, e.g., REYDAMS, *UNIVERSAL JURISDICTION*, *supra* note 42, at 152-56 (discussing Germany's progressive stance toward universal jurisdiction).

Verhoeven, for example, perceives universal jurisdiction as a means of imposing Western values on weaker developing Nations. He writes,

*La compétence universelle . . . n'est que l'expression d'un pouvoir, et non de la justice, si certains seulement en revendiquent l'exercice, tout compréhensible que soit le besoin d'un "procès" qu'éprouvent les victimes d'infractions particulièrement odieuses. Plutôt que les intérêts de la justice et d'une communauté internationale digne de ce nom, elle pourrait bien ne servir que ceux d'Etats occidentaux enclins à maintenir dans une dépendance, néo-colonialiste aurait-on dit il y a plusieurs années, des sociétés auxquelles ils imposent leur conception de la démocratie. Ce qui n'est sans doute pas très démocratique*¹¹⁴

[The universal competence . . . is only the expression of a power, not justice, if some are only asserting their rights, the need of a "lawsuit" is clearly understandable for the victims of particularly heinous crimes. More than serving the interests of justice or of the international community, the universal competence could only be useful to the western States, recently called neo-colonialist, and not to the countries on which they imposed their idea of democracy. This seems without a doubt not very democratic]

Quite apart from the increased potential for neo-colonialist practices, however, a more frequent exercise of universal jurisdiction would mean an increase in the inequitable targeting of nationals of weaker and poorer States.¹¹⁵ Such individuals have always been the main targets of proceedings under the exercise of universal jurisdiction. As Judge Bula-Bula points out in his individual opinion in *Arrest Warrant*, complaints have been instituted before Belgian courts on the basis of universal jurisdiction against Laurent Gbagbo of the Ivory Coast, Saddam Hussein of Iraq, Denis Sassou Nguesso of the Congo, Ariel Sharon of Israel, and Paul Biya of Cameroon.¹¹⁶ Developing Nations, on the other hand, being politically weaker in the international arena, and highly dependent on Western powers for humanitarian aid, are not in a position to initiate investigations and prosecutions of

114. Joe Verhoeven, *Vers un ordre répressif universel?* [Toward a Repressive Universal Order?], 45 ANNUAIRE FRANÇAIS DE DROIT INT'L 55, 63 (1999).

115. See Steven Ratner, *Belgium's War Crimes Statute: A Post Mortem*, 97 AM. J. INT'L L. 888, 894 (2003).

116. See generally Concerning the Arrest Warrant of 11 April (Congo v. Belg.), [2002] I.C.J. 3, 126, [2002] 41 I.L.M. 536, 597-621 (separate opinion of Bula-Bula, J.).

European and North American nationals, particularly where there is no personal or territorial connection with their countries.

Even if more powerful and wealthy Nations are in a better position than developing countries to ensure that Western nationals are not insulated from liability, they cannot be expected to apply principles of international law consistently. Thus, for example, a request by seven Iraqi families that Belgian authorities investigate former U.S. President George H. W. Bush, U.S. Vice President Richard Cheney, U.S. Secretary of State Colin Powell and retired U.S. General Norman Schwarzkopf for perpetrating war crimes during the 1991 Gulf War ended in the abrogation of Belgium's expansive universal jurisdiction legislation altogether.¹¹⁷ The United States threatened to refuse to fund a new headquarters building for NATO in Belgium and to consider barring its officials from traveling to the country unless the Belgium agreed to repeal its law.¹¹⁸

A final concern in relation to expanding universal jurisdiction is that it could undermine the role of the ICC. Article 17 of the Rome Statute states:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;¹¹⁹

Therefore, assuming the existence of universal jurisdiction *in absentia*, a *bona fide* investigation by any State of any of the offences listed in Article 5 of the Statute (there is arguably universal jurisdiction for all of these crimes) would preclude a hearing by the ICC. This would effectively render the Court unnecessary, as-

117. *See id.*

118. *See id.* at 891.

119. Rome Statute of the International Criminal Court, art. 4, U.N. Doc. No. A/CONF.183/9 (1988).

suming that countries such as Belgium insist on exercising universal jurisdiction to the fullest extent permitted under international law. The D.R.C. has suggested that the exercise of universal jurisdiction may even run contrary to the object and purpose of the Rome Statute, in contravention of Article 18 of the Vienna Convention on the Law of Treaties.¹²⁰ On the other hand, it is arguable that if the ICC is successful in bringing criminals to justice, municipal courts and prosecutors will stop exercising universal jurisdiction altogether, in which case there would be little point in recognizing the existence of universal jurisdiction *in absentia*.

B. Fewer Delays in Initiating Investigations and Prosecutions

In the event that universal jurisdiction *in absentia* garners official recognition, countries desiring to exercise such jurisdiction will not be required to wait for the accused to travel to their territory (a thing he or she is not likely to do if aware that the State actively exercises universal jurisdiction). Thus, investigations and prosecutions could be initiated more rapidly. This would have two main advantages. First, it would bring perpetrators to justice more quickly. Second, it would increase the likelihood of conviction, since it would facilitate the gathering of evidence and testimony. As Thieroff and Amley point out,

There are a variety of . . . pragmatic reasons for the speedy introduction of information that tends to incriminate the accused. For example, evidence tends to degrade over time. Witnesses may forget important facts and details about the actions of the accused or the context in which the alleged violations took place. They may also die from natural causes.¹²¹

However, these arguments are subject to challenge. As has been mentioned already, the initiation of an investigation or prosecution will not necessarily result in the extradition and incarceration of the accused at any stage, particularly where the accused's home State refuses to cooperate. In addition, with respect to evidence, since the exercise of universal jurisdiction necessarily

120. See Memorial of the Democratic Republic of Congo (Congo v. Belg.), [2001] I.C.J. Pleadings 25; see also Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331 (1969).

121. Thieroff & Amley, *supra* note 98, at 251.

means that the crime will have been committed in another State, there are substantial costs associated with evidence gathering, such as having witnesses flown in, or having the tribunal visit the State in which the alleged crimes have taken place in order to hear testimony.¹²² In addition, State officials in the jurisdiction where the evidence lies may be uncooperative, and make it impossible to visit crime scenes, or refuse to allow investigators access to witnesses.¹²³ Even when prosecutors can obtain evidence, it will be difficult for foreign officials to verify its authenticity, or interpret it properly (particularly where testimony in a foreign language is concerned). The result is that foreign tribunals and officials will generally have access to evidence of questionable authenticity, in smaller quantities, that they may be unable to properly understand. This would be particularly problematic in cases of universal jurisdiction *in absentia*, since not even the accused would be available to act as a source of information for prosecution and defense counsel. The result is that the likelihood of obtaining a conviction when universal jurisdiction *in absentia* is exercised is less likely than advocates argue.

C. Trials in Absentia

While generally not permitted in common law countries such as Canada, the United Kingdom, and the United States, criminal trials *in absentia* are accepted practice in civil law countries.¹²⁴ States have not as of yet attempted to try international criminals *in absentia* in their municipal courts on the basis of universal jurisdiction. *In absentia* proceedings, however, have been used in the context of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to try international criminals who fail to appear before the tribunal.¹²⁵ Although trials are not held before the tribunal unless the accused is present, under

122. See Luc Reydam's, *International Decision: Niyonteze v. Public Prosecutor*, 96 AM. J. INT'L. L. 231, 233 (2002) (explaining that this is the current practice of States such as Switzerland when exercising universal jurisdiction).

123. See Broomhall, *supra* note 95, at 412.

124. See Anne L. Quintal, *Rule 61: "The Voice of the Victims" Screams Out For Justice*, 36 COLUM. J. TRANSNAT'L L. 723, 741 (1998) (describing *in absentia* provisions in the criminal procedure codes of France, Italy, and the Netherlands); see also Neil P. Cohen, *Trial in Absentia Re-Examined*, 40 TENN. L. REV. 155 (1973) (arguing that many situations warrant trials *in absentia*).

125. See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L. L. 516 (2000).

Rule 61 of the ICTY Rules of Procedure, if the accused fails to appear, a public hearing is held in which witnesses are called and evidence is presented in order to determine whether the indictment against the defendant should be "confirmed," and an international arrest warrant issued.¹²⁶ Rule 61 was adopted in order to provide a forum for condemning defendants' actions, and voicing the allegations of their victims.¹²⁷ Prosecutors invoked Rule 61 in the cases of Radko Mladic and Radovan Karadic, two Bosnian Serbs who failed to appear before the ICTY.¹²⁸ If universal jurisdiction *in absentia* gains recognition, States would be able to conduct Rule 61-type proceedings, or even conduct trials *in absentia* of individuals accused of serious international crimes in municipal courts, particularly civilian jurisdictions that allow for such proceedings in their national legislation. It is arguable, however, that this may be an undesirable development in international law.

Trials and other judicial proceedings *in absentia* may violate Article 14(3)(d) of the International Covenant on Civil and Political Rights, which provides for the right of the accused to be present during his or her trial.¹²⁹ Although the United Nations

126. See Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), R. 61, U.N. Doc. IT/321 REV 21 (2001), available at http://www.un.org/icty/basic/rpe/IT32_rev32.htm (last visited Nov. 14, 2004). France suggested that defendants who failed to appear before the tribunal should be tried *in absentia*. Due to U.S. opposition to this suggestion, Rule 61 was proposed as a "compromise" solution. See Letter from the Permanent Representative of France to the United Nations to the Secretary-General (Feb. 10, 1993), Annex 2, U.N. Doc. S/25266 (1993); see also Letter from the Permanent Representative of the United States of America to the United Nations to the Secretary-General (Apr. 5, 1993), Annex, U.N. Doc. S/25575 (1993). See generally VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

127. See Thieroff & Amley, *supra* note 98, at 247 (discussing rationales for Rule 61, including serving as a Truth Commission).

128. See Quintal, *supra* note 124, at 756.

129. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Assuming a trial proceeded *in absentia* and the accused were to become physically available later, there would exist the practical problem of having to try him again under this covenant, after the prosecutor already lead all his evidence, much to his disadvantage. Rule 61 addresses this issue by allowing the prosecutor to lead enough of his evidence to indicate the kind of case he has against the accused for the benefit of victims and of world anticipation, but without being required to tip his entire hand. At a Rule 61 hearing in the case of Radovan Karadzic and Ratko Mladic, prosecutor Mark Harmon recognized this compromise, telling the Tribunal:

Human Rights Committee has expressed the opinion that an accused who fails to appear waives his or her rights under Article 14(3)(d),¹³⁰ this position is disputed by certain jurists.¹³¹ As Professor Lori Damrosch persuasively argues, the legitimacy of universal jurisdiction is a function of "the extent to which it is understood as integrally connected with and supportive of other equally valid principles of international law."¹³² Such principles surely include the basic requirement of procedural fairness.

Even assuming the legality of prosecutions *in absentia* under international human rights law, however, there are good reasons for seeking to avoid such proceedings. First, the absence of the accused in such proceedings may lead juries and officials to draw the inappropriate inference that because the accused may be absent he or she is a fugitive and therefore probably guilty, even if there is not sufficient evidence to support this conclusion.¹³³ In addition, it has been suggested that it is an essential aspect of the adversarial system that the accused be present to oversee the work of defense counsel, seeking out improper conduct by the judge or the jury, or pointing out errors of fact alleged by the prosecution.¹³⁴ It has also been argued that the presence of the accused during trial is an essential part of the punishment that the guilty ought to suffer.¹³⁵ Finally, the legitimacy of proceedings against international criminals will be undermined by trials

It has often been repeated that a Rule 61 hearing is an opportunity to give voice to the victims. Perhaps. But because this is not a trial, these voices can be heard only as a plea to the court and the world that [the defendants] be arrested and brought to justice . . . The remaining evidence will, just like the already mentioned crime victims, be kept for the moment when Karadzic and Mladic find themselves as defendants in the dock.

MIRKO KLARIN, INSTITUTE FOR WAR AND PEACE REPORTING ALMOST IN THE DOCK (1996), available at http://www.iwpr.net/index.pl?archive/war/war_44_199608_03.txt (last visited Nov. 14, 2004).

130. *See Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Hum. Rts. Comm., 21st Sess., gen. comt. 13, art. 14, U.N. Doc. A/40/40 (1994); *see also Mbenge v. Zaire*, Communication No. 16/1977, U.N. GAOR, Hum. Rts. Comm., 38th Sess. at 134, ¶ 14.1, U.N. Doc. A/38/40 (1983).

131. *See* Thieroff & Amley, *supra* note 98, at 260.

132. *See* Lori F. Damrosch, *Comment: Connecting the Threads in the Fabric of International Law*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 91 (Stephen Macedo ed., 2004).

133. *See* Cohen, *supra* note 124, at 181.

134. *See id.*

135. *See id.* at 179.

in absentia, as the absence of the accused would convey a message that would bring the judicial system of the forum State into disrepute, i.e., that the State exercising jurisdiction and its judicial system are powerless to bring criminals before their tribunals, or that the defendant does not believe that that he will obtain a fair trial in the State asserting universal jurisdiction.¹³⁶

CONCLUSION

Unfortunately, it is impossible at this time to say whether or not universal jurisdiction *in absentia* is permissible or not as a matter of international law. This is due to the lack of consensus on the question whether or not the principles set out in the *Lotus* case continue to apply. Perhaps more importantly, it is due to the dearth and inconsistency of State adjudication of this issue. Without more jurisprudence in this area to guide us, it is difficult to determine whether universal jurisdiction is the presumptive rule, or where it does exist, the exception.

For the time being, it is sufficient to point out that the exercise of universal jurisdiction *in absentia* is inconsistent with many of the historical justifications for the exercise of universal jurisdiction. In addition, the exercise of universal jurisdiction *in absentia* is likely to pose important problems from a policy point of view. While the increase in frequency with which such jurisdiction would be exercised would have the effect of decreasing the impunity perpetrators of serious international crimes currently enjoy, it is also likely to pose a threat to the stability of international relations, lead to multiple claims against individual defendants, and undermine the role played by the ICC. In addition, while the existence of universal jurisdiction *in absentia* would result in fewer delays in bringing defendants to justice, officials would be required to make decisions on the basis of little evidence which might be of questionable authenticity. Finally, universal jurisdiction *in absentia* would make it possible for countries to try international criminals with no connection to their State. This would call into question the fairness, and by extension, the legitimacy of such proceedings, and bring into disrepute the judicial systems that exercise universal jurisdiction.

Guidelines, or restraints upon the exercise of universal juris-

136. See *id.* at 177.

diction *in absentia* such as those proposed by judges like Higgins, Kooijmans, and Buergenthal, while creative, do not amount to a complete response to these concerns. At the very least, they should be borne in mind by governments as they shape State practice in the coming years, and by international and municipal tribunals called upon to rule on the scope of the doctrine of universal jurisdiction in the future.